UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VALMET, INC. and UNITED STEEL, PAPER AND FORESTRY RUBBER, MANUFACTURING, ENERGY, ALLIED AND INDUSTRIAL SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO	CASES: 15-CA-206655 15-RC-204708

RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

FISHER & PHILLIPS LLP
JOSHUA H. VIAU
DOUGLAS R. SULLENBERGER
1075 Peachtree Street, NE
Suite 3500
Atlanta, GA 30309
Tel: 404-231-1400
Fax: 404-240-4249
jviau@fisherphillips.com

COUNSEL FOR RESPONDENT VALMET, INC.

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I. INTRODUCTION

Valmet, Inc. ("Valmet" or "Company" or "Respondent") respectfully submits this Brief in support of its Exceptions to the Decision and Order of Administrative Law Judge Arthur J. Amchan ("ALJ") on the Complaint ("Complaint") issued by the National Labor Relations Board, Region 15 ("NLRB"), based on unfair labor practice charges and objections to an election filed by Charging Party, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (the "Union"). At issue in these consolidated cases is whether Respondent violated §§8(a)(1) and 8(a)(3) of the National Labor Relations Act of 1935, as amended, 29 U.S.C. §151 et seq. (the "Act") and if such conduct warrants a re-run election.

As set forth below, the ALJ erred in the April 17, 2018 Decision and Order when he found that Valmet violated the Act. A review of record evidence reveals that Valmet did not engage in unlawful conduct during the critical period, but instead engaged in and communicated lawful messages to the employees including the facts and realities of union representation and the negotiating process. Valmet did not, as the ALJ erroneously found, engage in threats or other unlawful conduct. In this regard, the ALJ's findings are erroneous.

II. STATEMENT OF THE CASE

Valmet is a global corporation that rebuilds and performs maintenance on equipment that is used by customers in the paper industry at its Columbus, Mississippi facility. On August 21, 2017, the Union filed a petition (Ex. GC 1(a)) seeking to represent a unit of all production and maintenance employees at the facility. Pursuant to a Stipulated Election Agreement, a secret ballot election was held on September 14 and 15, 2017. (GC Ex. 2, ¶ 8; Tr. 68.) The tally of ballots

showed forty-three (43) employees voting against and forty-two (42) for union representation. (GC Ex. 4.)

The Union filed the underlying objections to the election on September 20, 2017 (GC Ex. 1(d)) and the underlying unfair labor practice charge, including three amended charges between September 21 and November 30, 2017. (GC Exs. 1(e), (i), (k), and (m)). The resulting Complaint alleged that Valmet violated Sections 8(a)(1) and 8(a)(3) by (1) unlawfully promising employees a benefit through a quiz contest/raffle, (2) unlawfully threating employees with job loss, loss of benefits, frozen wages, futility, and unspecified reprisals, and (3) unlawfully soliciting employee complaints and grievances, promising increased benefits and improved terms and conditions of employment. (GC Ex. 1(o).)

This case was tried before the ALJ in Columbus, Mississippi on February 26 and 27, 2018. On April 17, 2018, the ALJ issued a Decision and Order recommending that two of the allegations be dismissed and finding the others meritorious. He further recommends that the objections mirroring the complaint allegations he finds unlawful to be sustained and recommends a rerun election be held.

Valmet timely filed exceptions to the decision and, pursuant to Section 102.46(a) of the Board's Rules and Regulations, submits this brief in support thereof.

III. QUESTIONS ADDRESSED

The questions presented that are addressed below are as follows:

1. Whether Valmet violated Sections 8(a)(a) and 8(a)(3) of the Act by conducting a quiz contest on the grounds that the contest assisted Valmet in identifying employees who might or might not be sympathetic with the organizing drive; whether the ALJ has the authority to find a violation based on allegations that were not included in the Complaint and not litigated at the hearing.

2. Whether Valmet, through Plant Manager Brian Hammerbacher, violated Section 8(a)(1) of the Act by threatening employees that their wages would be "frozen" if they selected union representation.
3. Whether Valmet, through Vice President of Human Resources Doug Sheaffer, violated Section 8(a)(1) of the Act by threatening employees that their wages would be "frozen" if they selected union representation.
4. Whether Valmet, through supervisor Chris Cliett, violated Section 8(a)(1) of the Act by threatening employees that their step-progression raises would be "frozen" if they selected union representation.
5. Whether Valmet, through independent contractor Tiffany Wallace, violated Section 8(a)(1) of the Act by alleged threatening comments that the leadman position would be eliminated if employees selected union representation.
6. Whether Valmet, through Hammerbacher, violated Section 8(a)(1) of the Act by referring to the employee's existing severance benefit as a "non-union" plan.
7. Whether Valmet, through Production Manager Larry Richardson, violated Section 8(a)(1) of the Act by threatening an employee with discharge or unspecified reprisals if he selected union representation.
8. Whether the ALJ erred in recommending a rerun election.

IV. STANDARD OF REVIEW

Where exceptions to an ALJ's decision and recommended order have been filed, the Board is not bound by the findings of the ALJ and must engage in an independent review of the record. *See Standard Dry Wall Prods.*, 91 NLRB 544, 544–45 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). "[T]he Act commits to the Board itself the power and responsibility of determining the facts" and the Board must base its findings "on a de novo review of the entire record." *RC Aluminum Indus., Inc.*, 343 NLRB 939, 942 fn. 1 (2004) (citing *Standard Dry Wall Prods.*, 91 NLRB at 544–45).

It is axiomatic that "[i]n unfair labor practice proceedings, the Board bears the burden of proof and persuasion of showing that an employer has engaged in an unfair labor practice." *NLRB v. Pentre Elec.*, 998 F.2d 363, 370-71 (6th Cir. 1993); *see also*, NLRB Statements of Procedure, 29 C.F.R. §101.10(b); *NLRB v. Trasp. Management Corp.*, 462 U.S. 393 (1983). In his April 17 Order, the ALJ found that the General Counsel met this burden on five (5) unfair labor practice violations arising under both §§8(a)(1) and 8(a)(3) of the Act as alleged in the General Counsel's Complaint. A review of the record evidence reveals, however, that the ALJ's factual and legal conclusions on each of these unfair labor practice allegations is not adequately supported by facts and/or law and should therefore be dismissed.

V. ARGUMENT

A. The ALJ erred in finding that Valmet violated Sections 8(a)(1) and 8(a)(3) by conducting a quiz contest in a manner that would aid it in identifying employees sympathetic to the Union.

The ALJ found that Valmet's quiz contest was conducted within the parameters set forth by the Board in its decision in *Atlantic Limousine*, 331 NLRB 1025, 1029 (2000), but that it nonetheless violated the Act because it allowed the Company to gauge the union sympathies of the employees. (ALJD, p. 11.) Valmet excepts to this finding on the grounds that (1) the ALJ

crafted his own theory of the violation notwithstanding that it was neither alleged in the Complaint nor litigated at the hearing; and (2) the quiz contest did not constitute unlawful polling.

1. The ALJ impermissibly crafted his own theory of the violation.

Although the Union's initial Objections and Charge alleged that Valmet's quiz contest constituted unlawful polling and providing of a monetary award (GC Exs. 1(d),(e)), the Third Amended Charge and Complaint contained no such allegations. (GC Exs. 1(m), (o).) Paragraph 7 of the General Counsel's Complaint alleges that on about September 1, 2017, Valmet promised its employees a benefit in the form of a cash raffle prize if the employees participated in its anti-Union campaign. (GC Ex. 1(o), ¶ 7.) Paragraph 13 alleges that on about September 13, 2017, Valmet held a cash raffle prize for its employees because the employees formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. (GC Ex. 1(o), ¶ 13(a) & (b).) Rather than decide this issues presented in the Complaint were litigated at the hearing and argued in the post-hearing briefs, the ALJ instead revived the earlier abandoned claim of unlawful polling and found that Valmet's contest violated the Act on that theory alone. (ALJD, p. 11.)

Section 554(b)(3) of the Administrative Procedure Act (5 U.S.C. § 554(b)(3)) and Section 102.15 of the Board's Rules and Regulations require that the Complaint inform the Respondent of all asserted violations. "The Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing." *Maintenance Service Corp.*, 275 NLRB 1422 (1985). See also *NLRB v. Blake Construction Co.*, 663 F.2d 272, 279 (D.C. Cir. 1981); *Teamsters Local 992 v. NLRB*, 427 F.2d 582, 588 (D.C. Cir. 1970). "In all circumstances, a respondent has a basic right to adequate notice of the material issues to be tried

and to full and fair litigation of those issues." *Castaways Hotel & Casino*, 284 NLRB 612, 613-614 (1987).

Accordingly, it is black letter Board law that the General Counsel's theory of the case is controlling. *See Ken Maddox Heating & Air Conditioning*, 340 NLRB 43 (2003) (citing *Zurn/N.E.P.C.O.*, 329 NLRB 484 (1999)). It is equally well-established that it is inappropriate for an administrative law judge to make unfair labor practice findings that were not fully and fairly litigated. *Id.* (citing *Q-1 Motor Express*, 308 NLRB 1267, 1268 (1992)). Here, the ALJ blatantly disregarded this binding precedent and crafted his own theory upon which to find that Valmet's quiz contest violated the Act.

Consistent with the Complaint, General Counsel and the Union both argued in their post-hearing briefs that Valmet's quiz contest unlawfully promised and granted employees a benefit during the union campaign and discriminated against Union supporters by rewarding anti-union activities. (GC Br., pp 33-35; Union Br., pp. 19-23.) Neither party either expressly or implicitly argued that the quiz contest was conducted in a manner that constituted unlawful polling of employee's union sympathies. Likewise, none of the parties made any statements at the hearing that would put Valmet on notice of this allegation and evidence on the issue was not presented at the hearing.

In this case, given that the Complaint did not allege that Valmet's quiz contest constitutes unlawful polling, and in light of General Counsel's and the Union's unequivocal explanation of their theory in their briefs, Valmet is severely prejudiced by the ALJ's sua sponte finding. Valmet avers that it would have litigated the issue differently if it knew that the quiz contest was being challenged on grounds of unlawful polling. It would have, for example, proffered testimony that its supervisors were expressly told not to personally distribute the quiz contest to employees, but

instead to tell employees that the contests were going to be left in the supervisors' offices and employees could pick them up at any time. Valmet would have presented further evidence of its efforts to ensure the anonymity of the participants in the quiz contest and the winners. Indeed, such evidence was proffered to the Region during its investigation of the objections and first unfair labor practice charge, both of which alleged unlawful polling.

As much as the ALJ may believe that the evidence supports an alternative theory to the one advanced by General Counsel, he is constrained by Board precedent to consider and rule upon the case as it is alleged and litigated. *See GPS Terminal Servs.*, 333 NLRB 968, 969 (2001) (holding that a judge has no authority to amend the complaint in a manner that was "neither sought not consented to by the General Counsel," even when "the record evidence would support the additional allegations."); *Electrical Workers IBEW Local 1186 (Pacific Electrical Contractors*), 264 NLRB 712 fn. 3 (1982), (reversing a judge's finding of a violation that had neither been alleged in the complaint nor argued by the General Counsel because and was not fully litigated); *Florida Steel Corp.*, 224 NLRB 45 (1976), (reversing judge's finding that the respondent violated Section 8(a)(1) by "promulgating and enforcing" an unlawful no-access rule because "promulgation" was neither alleged in the complaint nor fully litigated.")

Consequently, the Board can easily reject the ALJ's finding that Valmet's quiz contest constituted unlawful polling under the Act.

2. The quiz contest was not administered in a manner that constituted unlawful polling.

Even throwing decades of Board precedent out the window and entertaining the ALJ's theory of a violation, Respondent's quiz contest was not administered in a manner that constitutes unlawful polling. The ALJ's presumption that Valmet could use the quiz contest to identify employees' union sympathies was based only on the fact that employees were encouraged to pick

obtain a quiz from their supervisor. Participation in the contest was completely anonymous. The contest cannot form the basis for a charge of unlawful polling because the Company did not know – indeed, could not know the identity of the employees who submitted quizzes. Employees picked up the quizzes from supervisors' offices, whether the supervisor was present or not. Instead of asking employees to identify themselves when they picked up or turned in the quizzes, the Company used a raffle ticket system essentially identical to the one the Board found permissible in *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1273 (2004). Under this anonymous raffle system, which is the same as the system used in this case, the Board in *Washington Fruit* adopted the ALJ's finding that "no one except the winners was identifiable." *Id.* There is absolutely no record evidence to support the ALJ's finding that "the contest assisted Respondent in identifying which employees might or might not be sympathetic with the union organizing drive."[1] (ALJD, p. 11.)

Indeed, Board cases finding that quiz contests constitute unlawful polling are almost exclusively limited to situations where employees are instructed to put their name on a quiz form, which was not the case here. *See Melampy Mfg. Co.* 303 NLRB 845(1991) (finding quiz contest violated the Act because it required employees to sign their names to the tests); *Houston Chronicle*, 239 NLRB 332 (1989) (finding that contest and prize interfered with employee free choice because employees were required to identify themselves on their entry forms). Because it is undisputed that employees were specifically instructed not to identify themselves on the contest forms in this case, the quiz contest did not violate the Act on the basis set forth by the ALJ.

[1] The ALJ also notes in his decision that Respondent has not presented evidence to support its contention that the quiz entries were graded after the election ended and that if that were the case, it could be a statutory violation because "it would indicate to Respondent how employees voted in the representation election." (ALJD p. 11, fn. 14.) This is similarly untrue as it is undisputed that employees were specifically prohibited from putting their names on the quiz forms and the quiz entries were identified only by number. (GC Ex. 2, ¶ 6.d, Jt. Ex. 3.)

B. The ALJ erred in finding that Respondent violated Section 8(a)(1) and engaged in objectionable conduct by telling employees that wage increases that were established past practices would be frozen if they selected union representation.

The ALJ erred in finding that Hammerbacher, Sheaffer, and Cliett violated the Act and engaged in objectionable conduct by telling employees that step-progression wage increases would be frozen. (ALJD, pp. 11-12.) Regarding the statements made by Hammerbacher and Sheaffer, which are evidenced by two (2) surreptitious audio recordings obtained by an employee spear heading the Union's organizing efforts, the ALJ fails to consider the statements in the overall context of which they were given. Regarding the alleged comments of Cliett, the ALJ incorrectly credits the testimony of a single employee over the corroborating testimony of another employee and Cliett and makes illogical assumptions about the impact of the alleged comments.

The ALJ erred by failing to consider the overall context of the comments related to wages being "frozen" during negotiations in the event that the Union was certified. As the Board has noted, other employer statements made in the context of comments allegedly threatening frozen wages or benefits should be considered as a mitigating factor. *Uarco,* 286 NLRB 55 (1987). In *Uarco,* the judge found that employer statements made at a meeting in which a statement concerning benefits being frozen clarified its meaning: "Within the context of all Respondent's statements, I conclude that employees were not told that they would not receive benefits and wages already scheduled or due them, but that use of the word 'frozen' was merely calculated to mean that nothing could be lost pending negotiations and resolution of the question concerning representation, i.e., the status quo would continue." *Id.* at 84. The Board adopted the judge's finding noting that the judge found the statement to mean only that the employer would maintain the status quo "[i]n the context of all the Respondent's oral statements…" *Id.* at 57.

In this case, the ALJ failed to recognize Valmet's clarifying statements from the very meetings in which the comments were made. *See Chef's Pantry, Inc.*, 247 NLRB 77, 83 (1980) (adopting ALJ's conclusion that employer did not violate the Act by stating that there were no guarantees that "wages, benefits, and working conditions remained the same when a union was voted in and were then negotiated upward," and showing a blank sheet of paper, stating "that bargaining starts with a blank sheet of paper, and everything has to be negotiated from that point"); *Telex Commc'ns*, 294 NLRB 1136, 1140 (1989) (employer lawfully told employees that bargaining involved give and take, that they would not necessarily receive higher wages and benefits, and that they might "win, lose, or draw" as result of bargaining; statements did not constitute threat to reduce wages if employees selected union as their bargaining representative). *See also, S. Bakeries, LLC v. N.L.R.B.*, 871 F.3d 811, 821 (8th Cir. 2017) (holding that employer did not engage in unlawful threat of reprisal or promise of benefit by telling employees that the "union could only make promises but could not guarantee that they would come true," "that the union would only win what the company was voluntarily willing to give," and that "a union is powerless in guaranteeing changes.").[2]

When considered within the overall message of the presentations and conversations, these references to step progression raises as being "frozen" do not violate the Act.

1. Hammerbacher's statements.

The AlJ did not cite any facts or evidence in support of his conclusion that The ALJ did not cite any facts or evidence in support of his conclusion that Hammerbacher – as opposed to Cliett or Scheaffer – violated 8(a)(1) by "telling employees that wage increases that were established past practices would be frozen, and/or otherwise indicating that employees would not

[2] Notably, the ALJ did not find that Sheaffer's comments constituted unlawful threats of futility or solicitation of grievances, dismissing those allegations. (ALJD, pp. 12-13.)

receive such increases." ALJ Dec., p. 11. The ALJ's decision does not quote any specific offending statements made by Hammerbacher or discuss why any of Hammerbacher's statements would have violated the Act.

Indeed, the ALJ's generalized conclusion regarding Hammerbacher's statements removes any reference to two important points. First, Hammerbacher only referred to the status quo and a "frozen" terms and conditions during negotiations. The ALJ's generalized conclusion leaves off that important modifier. Second, Hammerbacher's only statement regarding terms and conditions being "frozen" came in an explanation of the term "status quo," in which Hammerbacher stated that "everything is really frozen because everything is subject to negotiations." (GC Ex. 3A at 7:04.) Taken in context, Hammerbacher's statements were nothing more than an explanation that during negotiations, the employer is not permitted to make unilateral changes to discretionary terms and conditions of employment, and so the status quo must remain. "That, of course, was an accurate statement of existing law. Indeed, in some circumstances, even a reference to wages typically remaining frozen during negotiations is perfectly lawful." DHL Express, Inc., 355 NLRB 680, 694 (2010) (citing Flexible Indus., 311 NLRB 257 (1993) and Mantrose-Haeuser Co., 306 NLRB 377 (1992)).

2. The ALJ fails to recognize the legality of Sheaffer's comments outside of the question and answer period and the context of his use of the term "frozen."

The ALJ concluded that the "general tenor of the [sic] Sheaffer's prepared remarks was that unit employees were unlikely to benefit from selecting union representation." (ALJD, p. 6.) Contrary to the ALJ's incorrect classification, Sheaffer's remarks did not communicate that employees would not benefit from union representation, but rather truthfully advised employees about the collective-bargaining process, about the benefits they currently receive, and about the fact that such matters become subject to negotiation in the event that the Union is certified, all of

which are expressly permitted by Section 8(c) of the Act. Sheaffer's comments were made in the direct context of permissible communications, including the fact that negotiations can result in better conditions, worse conditions, or the same conditions or any other variable that bargaining may reach. To minimize any risk that his legally permissible comments be misconstrued, Sheaffer expressly communicated to employees that Valmet would bargain in good faith with the Union if the employees voted in favor of Union representation. (GC Ex. 3B. at 36:00.)

Although the ALJ found that Sheaffer's comments outside of the question and answer period did not violate the Act, he for some reason concludes that Sheaffer's talks, with the exception of his response to questions, were the same at all six (6) of the meetings that he conducted in the two (2) days prior to the election. (ALJD, p. 6.) Other than the two recordings, only one of which was of Sheaffer, General Counsel provided no evidence regarding any other captive audience meetings and, in fact, has made no allegations about comments made at any other meetings. The ALJ's inference that similar comments were repeated at all meetings is unsupported. At no point did General Counsel or the Union ask questions or raise claims that the alleged threats were repeated in any other meetings. The General Counsel failed to offer evidence of any alleged threats or other violations stemming from Sheaffer's other five (5) meetings (or the other twelve (12) captive audience meetings conducted during the weeks leading to the election for that matter).

The ALJ bases this improper conclusion on his belief that Sheaffer spoke from prepared remarks. (ALJD, p. 6.) Sheaffer did not speak, as the ALJ states, from "prepared remarks at all 6 meetings." (ALJD, p. 6.) Rather, Sheaffer testified that he reviewed a list of topics to cover, which was prepared by legal counsel, before the meetings. (Tr. p. 136.) Neither he nor any other witness

testified that he "spoke from prepared remarks," which is much different than reviewing the topics he intended to cover, which was his testimony.[3] (Tr. p. 136.)

The ALJ further errs in ignoring the fact that the only statements that Sheaffer made in relation to "frozen" wages took place during the question and answer session of the recording meeting. (GC Ex. 3B.) Sheaffer testified that the topic of wages and what would happen to wages was not something that he wanted to discuss in the meetings. (Tr. pp. 136-137.) Any inference that he covered the topic of wages in all six of the meetings is directly contradicted by his testimony that he wanted to stay away from the topic and did not intend to address that topic during the meetings. (Tr. pp. 136-137.) In fact, Sheaffer testified that he did not answer questions regarding wages in other meetings and told the employees that whether the step progression raises would continue would be subject to further legal review on the Company's part. (Tr. p. 138.)

The only references to wages being "frozen" during the recorded meeting came after Sheaffer asked for questions. (Tr. 79, 137; GC Ex. 3-B at 38:50.) At the 38:50 mark of the recording employee Scotty Lawrence asked questions during which he was the only one who used the term:

> **Lawrence:** If it goes in and *you said it "freezes"* everything even though you are in a progression stage *it freezes* your grades and all is what you're saying. Why is that? Even though you are study at a certain point?
>
> **Sheaffer:** Because once the union is elected or certified as your official bargaining agent, we can't give any benefits or wage improvements without their say-so they may not want to have progression everything is up for negotiation. They may say we do not like progression, they may say we don't like paying for performance. They may want to do away with some of those things. We have to honor and go with what is agreed upon in negotiations.

[3] On cross-examination, General Counsel did refer to Sheaffer's "prepared remarks," which was parroted back to him by Sheaffer in response to questioning. (Tr., pp. 139-143.) But the use of the term "prepared remarks" was clearly being used to distinguish between the portion of the meetings during which Sheaffer talked and during which employees asked questions. This cannot form the basis for a finding that he spoke from notes or a script during the meetings.

> **Lawrence:** That is where I want to ask why is it *frozen* there I just don't understand why it would stop like you said if it was *frozen* and we are still getting progression. As long as it was, I always come here three months and I guess, I'm trying to get, even though were waiting on the contract be settled will go back then we'll go back to.
>
> **Sheaffer:** Well we're settling the contract.
>
> **Lawrence:** I guess.

(GC Ex. 3B at 38:50.) Another audience member brought up the issue of wage increases:

> Q: When this is in negotiations you still have your medical?
>
> A: We can't change what is called … the status quo. So the benefits that are in effect today would basically stay. If the company decided every year we have to do reenrollment and premiums change as to what companies charge us, all of that would stay in place, but stuff like wage increases we would have to freeze. We could not change any employment practices. If we had to have a layoff, we could not come up with a new way of doing it. We would have to do it the way we have always done it type of thing.

(GC Ex. 3B at 48:53.) This is the only time Sheaffer used the terms "freeze" or "frozen" and his comments are not unlawful when viewed in conjunction with the concept of "status quo" on benefits and wages.

The ALJ compounds his error by failing to consider Sheaffer's comments under the totality of the circumstances and Sheaffer's overall presentation. Even more compelling here is that Sheaffer did not use the term except in response to employee questions in which they used the term. The ALJ summarily dismissed the glaring inference that employees were baiting Valmet managers into making "threatening" comments as a means to overturning the election by chastising Valmet for Sheaffer's lack of knowledge of the step-progression system in place. (ALJD, p. 12.) In doing so, the ALJ ignores the fact that Sheaffer expressly avoided telling employees whether the step-progression wages would be frozen in another meeting, telling them that it would be subject to further analysis with the Company's legal team. (Tr. p. 138.)

3. The ALJ erroneously found that Cliett told Lawrence and Nail that their step progression wages would be frozen.

Although the ALJ did not make an express credibility determination as to whether Cliett told employees Scotty Lawrence and Casey Nail that their step-progression raises would be "frozen," he wrongly found that Cliett's comments violated the Act. While Lawrence testified that Cliett told him that the step progression raises would be "frozen," Cliett testified that he told Lawrence that they would be subject to the "status quo," which statement is factually accurate according to the ALJ's own finding that the step-progression wages would have to continue during negotiations. (ALJD, p. 11.) Rather than decide which version of the events is true, the ALJ finds a violation based on his specious finding that Cliett "at a minimum, created uncertainty in the minds of Lawrence and Nail as to whether they would receive the progressive wage increases they were otherwise expecting." (ALJD, p. 7.)

This finding is not supported by the evidence. First, Cliett did not create this uncertainty in the mind of Lawrence because Lawrence testified that he already knew the answer to the question when he asked it during Sheaffer's meeting because he had already discussed it with representatives of the union. (Tr. p. 81.) Lawrence's further testimony directly contradicts the ALJ's finding that Cliett created doubt in Lawrence as to whether he would receive his step progression raise:

> Q: And you also said in your statement that after Mr. Cliett said raises were frozen, that you knew this was a lie because I talked to the Union and they said as long as the raises were planned they weren't frozen, they had to take place, correct?
>
> A: They were set. Yes, sir.
>
> Q: So Mr. Cliett's comment to you didn't change your thoughts on whether the progression raises would continue?
>
> A: They didn't.

(Tr. p. 81.) Thus, the ALJ's conclusion that Cliett created doubt in the mind of Lawrence as to whether he would continue to receive his step-progression raise is wrong and cannot support a finding that Cliett threatened him.

Nail also did not testify that he was uncertain about whether he would receive his step progression raise. Contrary to any finding that Cliett's comments had a profound impact on Nail, he did not even recall the conversation between Lawrence and Cliett regarding step progression when initially questioned by General Counsel at the hearing. (Tr. pp. 86-87.) After he was provided the opportunity to refresh his recollection with his Board Affidavit, Nail testified that he remembered the conversation, but that he "wasn't necessarily a part of the conversation." (Tr. p. 89.) Nail also could not affirmatively say that Cliett used the term frozen, but rather that he could recall that he said they would be included in "status quo." (Tr. p. 90.) Although Nail did testify that he was uncertain about whether he would continue to get his step-progression increase, he unequivocally testified that Cliett said that step-progression raises would remain in status quo. (Tr. p. 90.)

The ALJ relied on the premise that Cliett had created doubt as to whether these employees would receive their step-progression raises to seemingly avoid making a credibility determination between the conflicting testimony of Lawrence and Cliett. This is likely because Lawrence is not credible. He clearly lied during the September 13 captive audience meeting when he asked Sheaffer "If it goes in and *you said it "freezes"* everything even though you are in a progression stage *it freezes* your grades and all is what you're saying. Why is that? Even though you are steady at a certain point?" (GC Ex. 3B at 38:50.) Sheaffer never made any such a statement or used the words "freeze" or "frozen" prior to the question and answer portion of the meeting. (Tr. 139, 140; GC Ex. 3B.) A review of General Counsel's own exhibit squarely rebuts Lawrence's false

accusation and testimony. (Tr. 79; GC Ex. 3B.) Lawrence also falsely testified that Sheaffer used the term "frozen" in response to his question. (Tr. 80.) In total, Lawrence initiated use of the words "frozen" and "freeze" four (4) distinct times during his brief questioning of Sheaffer. (GC Ex. 3B at 38:50.) Lawrence then lied both during the meeting and at the hearing to make it look like Sheaffer had used those words.

Crediting Cliett's testimony that he did not use the term frozen, but that he told the employees that the status quo must remain intact undermines the ALJ's finding of a violation based on Cliett's comments. *Apogee Retail, NY, LLC*, 363 NLRB No. 122 (Feb. 17, 2016) (affirming ALJ finding of no unlawful threats where supervisor told employees that wages were frozen during contract negotiations, noting that "what some people may have inferred from [the supervisor's] remarks is not necessarily the same as what she actually said").

C. The ALJ erred in finding that Respondent by Tiffany Wallace engaged in objectionable conduct and violated Section 8(a)(1).

The ALJ relied on non-existent evidence and faulty credibility determinations in finding that Wallace was Valmet's agent under an apparent authority agency theory. (ALJD, p. 13.) According to the ALJ, Wallace had apparent authority to speak for Respondent "given her responsibilities in the plant and because she told [employees Bush and Frierson] that she was imparting the information after attending a meeting with respondent's management and attorneys." (ALJD, p. 13.)

The factual record is insufficient to support the ALJ's finding, especially in light of the clear testimony that Wallace's job duties do not include the authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline … other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action." 29 U.S.C. § 152(11). (Tr. 146.) The absence of apparent or actual authority in the actual performance of her

daily duties preclude any finding of apparent authority. *See, e.g., Jules v. Lane, D.D.S., P.C.*, 262 NLRB 118, 122 (1982) (no apparent authority where alleged agent's duties in the normal course of business would not have included threats of discharge); *D.G. Real Estate, Inc.*, 312 NLRB 999 (1993) (real estate agent who was introduced by the company president to union picketers as the company's real estate agent, attended a union meeting with the company president, and who was present at the job site on a daily basis did not have apparent authority to deal with the union on behalf of the company); *Aljoma Lumber, Inc.*, 345 NLRB 261, 280 (2005) (independent contractor in charge of security did not have apparent authority to speak on behalf of company regarding union matters).

The credibility determinations used to support finding Wallace had apparent authority are likewise misplaced. While the Board is generally reluctant to overturn the credibility determinations of an administrative law judge, "where credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility." *J.N. Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979) (quoting *Electrical Workers Local 38*, 221 NLRB 1073, 1074 (1975)). Further, even demeanor based credibility findings are not dispositive when the testimony is inconsistent with "the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Humes Electric, Inc.*, 263 NLRB 1238 (1982). In this case, the ALJ does not base his credibility determinations on demeanor, but on corroboration and motive. Regarding corroboration, the ALJ is incorrect in his assertion that <u>both</u> Bush and Frierson "testified that Wallace told them that she had just left a meeting with Respondent's attorneys, which is the sole basis for finding Wallace had apparent authority." (ALJD., p. 8.) Frierson never testified that Wallace told him and Bush that "she had just left a meeting with Respondent's attorneys." (Tr.

109-114.) To the extent that the ALJ bases his credibility determination on the theory that Frierson and Bush testified consistently on this point, his finding is in error.[4]

The ALJ's credibility determination, in which Bush and Frierson's testimony is credited over Wallace's, (ALJD, p. 8 fn.8) is further undercut by his reliance on the notion that "Bush would have had no way of knowing that Wallace had just come from a management meeting at which an attorney was present unless Wallace told him that." *Id.* This finding of "fact" is not supported by any evidence and constitutes conjecture in the absence of fact. The ALJ's findings on this point are further undermined by the fact that Wallace did not, as the ALJ found, "confirm" that she spoke to Bush and Frierson "just after leaving a meeting in which a company attorney was present." *Id.* Wallace did testify that she attended one meeting with a company attorney present before the election (Tr. 157:15-20.) In response to General Counsel's question, "Do you recall if that meeting was before or after you spoke to" Bush and Frierson, Wallace responded only that the conversation "was after th[at] meeting." (Tr. 157:21-23.) Wallace was not asked any other questions regarding the timing of the meeting with a company lawyer present compared to her conversation with Bush and Frierson, and she certainly never "confirmed" that the conversation occurred "<u>just after</u>" leaving a meeting in which a company attorney was present.

Furthermore, the ALJ did not address the inconsistencies in Bush's and Frierson's testimony regarding their conversation with Wallace. For instance, both Bush and Frierson admitted that they did not have complete recollections of the conversation. (Tr. 104:10-13 [Bush]; 112:6-12.) And while Bush testified that the conversation lasted "about two minutes," (Tr. 98:13-14), Frierson testified that the conversation lasted "15 minutes or so." (Tr. 112:2-3.)

[4] The ALJ's belief that Wallace's stated reasons for talking to Bush and Frierson is "nonsensical" ignores the totality of her testimony on the topic. (ALJD, p. 8 fn. 8.) Her reasoning makes perfect sense when you consider the fact that she believed many of the pro-union employees wanted her removed from her position and that Mr. Parker was influential with the Union. (Tr. p. 153.)

The improper crediting of Frierson and Bush over Wallace similarly undermines the ALJ's finding that Wallace's comments to them violated the Act. The ALJ's finding that Wallace was not telling employees that leadman positions and pay would be negotiated rather than threatening that they would be eliminated is undermined by the above-described faulty credibility determination.

D. The ALJ erred in finding that Respondent by Brian Hammerbacher violated the Act and engaged in objectionable conduct by "suggesting" that if employees selected union representation, they would lose the benefits of Respondent's severance plan.

The ALJ found that Hammerbacher unlawfully threatened employees that they would lose their current severance benefit if they selected union representation. (ALJD, pp. 6, 12.) Valmet excepts to this finding on the grounds that (1) the ALJ failed to recognize Valmet's right to compare union and non-union benefits; (2) failed to recognize Valmet's right to make statements of historical fact; and (3) even if unlawful statements were made, the ALJ failed to consider the entire context of the communications, including clarifying statements.

Under long-standing Board precedent, an employer may lawfully compare union and nonunion benefits and make statements of historical fact. *See, e.g.*, *Suburban Journals of Greater St. Louis, LLC*, 343 NLRB 157, 159 (2004) (noting that "[a]n employer is permitted to compare its represented employees' wages and benefits with those of its unrepresented employees . . . . [and] to state its opinion, based on such a comparison, that employees would be better off without a union"). In fact, the Board has consistently approved of factual comparisons of historical wages and benefits in the midst of representation campaigns. For example, in *RHCG Safety Corp*, 365 NLRB No. 88 (June 7, 2017), the Board approved of a Vice President of Operations' statement that "there were many members of Local 79 who were not working whereas his employees were working." *Id.* Rather than an impermissible threat, the Board adopted the ALJ's finding that the

statement was a protected "comparison between the work opportunities available to members of [the Union] in the industry at large as compared to the amount of work that the [Company] has made available to its own employees." *Id.* *See also TCI Cablevision of Washington, Inc.*, 329 NLRB 700, 701 (1999) (holding that the employer did not make an unlawful promise of benefit where it offered a comparison of 401(k) benefits, which were more beneficial at its non-unionized locations); *Viacom Cablevision*, 267 NLRB 1141, 1141-42 (1983) (approving of employer's comparison of "wages enjoyed by other employees in other [Company] systems and . . . statements of historical fact concerning the yearly increases which had been given elsewhere in the past").

The ALJ avoids addressing Valmet's legitimate arguments that the reference to the "non-union severance plan" was factually correct and that it is allowed to compare the benefits of unionized employees to that of non-union employees by inferring that "employees could reasonably infer that they will lose an ***existing*** benefit if they select union representation." (ALJD, p. 6 (emphasis in original; citations omitted.)) But when considered within the context of Hammerbacher and Kohl's overall message, the reference to the severance plan let employees know only that severance benefits would be negotiated, not that they "will lose" the benefit as conveniently interpreted by the ALJ. Hammerbacher and Kohl never told employees that they would lose this benefit.

To further support this leap in logic, the ALJ incorrectly ignores several statements made by Hammerbacher during the same meeting that informed employees that with respect to the severance plan and everything else, all would be negotiated: "it's all being negotiated if it isn't in the contract then it's that long list of policies and procedures of the company that apply … it could better from a policy standpoint, it could be worse, you don't know." (GC Ex. 3-A at 32:20.) The ALJ incorrectly dispenses with this important clarification by simply stating that these comments

"are not specific enough and would not have clarified his earlier statement." (ALJD, p. 5, fn. 5.) First, there was no earlier statement that needed to be clarified because Hammerbacher had not told employees they would lose the severance benefit. Second, the clarifying comments arose while discussing a recent event involving the transfer of two employees to avoid layoff. The fact that Hammerbacher was specifically discussing recent potential layoffs while noting that such procedures would be negotiated are almost certainly sufficient to clarify any earlier misconception that employees would automatically lose their current severance benefits.

The ALJ's reliance on Kohl's statements during the meeting to support his finding that the employees were threatened with loss of severance benefits is likewise misplaced. Kohl compared the benefit that the Columbus employees have now with the corresponding of benefit the Neenah, Wisconsin employees, who are represented by the Union, is absolutely permissible and does not support finding a violation. See *Scotts IGA Foodliner*, 223 NLRB 394 fn. 1 (1976). *See also, John W. Galbreath & Co.*, 266 NLRB 96, 96 (1983) (employer permitted to "stress to employees those benefits they have received without a union's assistance, and contrast wages and working conditions in his plant with those in unionized plants"); *Clark Equipment Co.*, 278 NLRB 498, 499-500 (1986) (no violation where employer truthfully informed employees that past benefit packages to the non-unionized plant employees were better than those at the employer's unionized plants); *Sheraton Plaza La Reina Hotel*, 269 NLRB 716, 717-718 (1984) (truthful statement corroborating report that union's contracts in the area did not provide the sick leave benefits currently enjoyed by the non-unionized employees). Rather than confirm any misconstruction that employee's would automatically lose the severance benefit, Kohl's comments eliminated the possibility that the employees could reasonably construe this accurate semantic reference to their current plan as "non-union" as a threat. *See, e.g., Big G Supermarket, Inc., d/b/a Town and*

Country Family Center, 219 NLRB 1098 (1975) ("[I]t cannot reasonably be held that Respondent was required to conceal innocent facts from the employees simply because the facts (namely the existence of insurance coverage) might lessen their ardor for unionization.").

Hammerbacher and Kohl simply noted during the meeting that Valmet had negotiated severance benefits with the USW in Neenah, but that those benefits did not include benefits were limited to plant closures. This cannot be reasonably construed as a threat that the Company would not negotiate in good faith regarding benefits, but to note the simple fact that current benefit levels are better than what the employees in Neenah had negotiated through the union. *See e.g., Dayton Hudson Corp.*, 316 NLRB 85, 95-96 (1995) (employer did not violate 8(a)(1) by telling employees that (1) pension and supplemental plans would be negotiable if union got in, and (2) workers in another unit represented by another labor organization did not have supplemental plan).

Perhaps most confusing is the ALJ's failure to consider the fact that Hammerbacher's reference to the severance plan as "non-union" is factually accurate as a legal matter stemming from the terms of the severance plan itself. The ALJ makes no mention of the facts that the current severance plan is governed by the Earned Retirement Income Security Act ("ERISA") and contains eligibility criteria that specifically excludes union represented employees: "To be eligible for the benefits provided under this Plan, you must be classified by the Employer as a non-executive employee of the Employer in the United States <u>who is not represented by a labor union.</u>" (R. Ex. 2, p. 3.) (Emphasis added.)

The ALJ correctly acknowledged that "an employer may lawfully compare union and nonunion benefits of historical fact," but refused to recognize this right in favor of the notion that "employees could reasonably infer that they will lose an ***existing*** benefit if they select union representation." (ALJD, p. 6) (emphasis in original). In support of this finding, the ALJ cited a

number of distinguishable cases, each of which arose in entirely different contexts. *See In Re Cooper Tire & Rubber Co.*, 340 NLRB 958, 959 (2003) ("It is well settled that alleged threats must be considered in context.").

In *Georgia-Pac. Corp.*, 325 NLRB. 867 (1998), a manager's statement that the employer's bonus plan was "developed for [the Employer's] non-union plants" was unlawful. But unlike Hammerbacher's comparison, the *Georgia-Pacific* manager made his statement in conjunction with an announcement that the employees would be receiving a quarterly bonus, "thus linking the notion of the bonus plan's existence to a nonunion workforce." *Id.* Similarly, a manager's written statement regarding bonus eligibility in *Cooper Tire* was unlawful where it was made alongside an announcement that the current year's bonus, which had already vested, was uncertain. *Cooper Tire & Rubber Co.*, 340 NLRB 108 (2003). Similarly, in *Longview Fibre Paper & Packaging, Inc.*, 356 NLRB 796, 803 (2011), a statement regarding non-union pension plans was unlawful only where employees were told that "they would automatically be foreclosed from participating in their present pension plan and 401(k) plan" if they chose union representation. In contrast, Hammerbacher did not make his severance plan comparison while informing employees of any bonus or severance payments. Nor did Hammerbacher's comparison imply that any existing benefit (*i.e.* a vested bonus) could be lost.

In further contrast, the *Georgia-Pacific* manager made no reference to the union's organizing campaign, and made no attempt to contextualize his statement by making clear that the bonus program would be negotiated if the employees voted for the union. *Georgia-Pac. Corp.*, 325 NLRB at 868. Hammerbacher's explicitly debunked any reasonable inference that employees would lose an existing benefit if they selected union representation when he clarified that, with respect to the severance plan and everything else, all would be negotiated: "it's all being

negotiated if it isn't in the contract then it's that long list of policies and procedures of the company that apply … it could better from a policy standpoint, it could be worse, you don't know." (GC Ex. 3-A at 32:20.)

The ALJ also cited *TCI Cablevision of Washington, Inc.*, 329 N.L.R.B. 700 (1999), in which the Board held that an employer did not violate the act when its manager informed unionized employees during a decertification campaign that its nonunion employees were covered by a 401(k) retirement plan. The ALJ apparently relied on *TCI* because the unionized employees in that case could not infer that the employer would take away existing benefits, since the unionized employees did not have a retirement program, and there were therefore no existing benefits to take away. However, the logic of *TCI* still holds here: truthfully informing unionized employees during a decertification campaign of better benefits at non-union facilities is the direct corollary to truthfully informing non-unionized employees during a certification campaign of worse benefits at unionized facilities. Indeed, the Board's conclusion in *TCI* is applicable here as well: "The Employer only recited facts and, in our view, it is not objectionable to truthfully inform employees of the facts." *Id.* at 701.

Based on the foregoing, had the ALJ correctly applied Board precedent to all of the relevant facts, including mitigating statements, he could not have reasonably found that Hammerbacher and Kohl's statements were unlawful.

E. The ALJ erred in finding that Respondent by Larry Richardson engaged in objectionable conduct and violated Section 8(a)(1).

The ALJ erred in finding that Richardson either explicitly or implicitly threatened employee Justin Leonard with his job or unspecified reprisals in violation of the Act. (ALJD, pp. 9-10, 14.) The allegations relate to a conversation that Richardson, who is the Production Manager, had with J. Leonard on the day of the election regarding comments that J. Leonard made

during one of the captive audience meetings in which Richardson was not present. (GC Ex. 1(o), ¶ 12; Tr. p 43-45.) The ALJ finds that Richardson threatened J. Leonard during a discussion regarding the issues raised at the meeting.

1. The ALJ relies upon unwarranted and illogical inferences that are directly contradicted by the testimony at the hearing.

In finding a violation, the ALJ makes several unwarranted inferences from the testimony of J. Leonard and Richardson that are contradicted by the record. First, J. Leonard made two distinct classes of comments during the captive audience meeting: (1) that Richardson was the main reason the Union was there because he "tries to run everything" (Tr. p. 45), and (2) that Richardson approved the shipment of a customer roll (paper manufacturing roll) be shipped despite that J. Leonard believed that he roll was not operating within specification. (Tr. pp. 45, 57.) While J. Leonard testified unequivocally that Richardson discussed the quality issue with him on September 14, he does not testify that Richardson brought up his comments that Richardson was the reason the union was there. (Tr. pp. 45, 56-57, 58-59.) Richardson testified that he only discussed the roll issue with J. Leonard. (Tr. pp. 187-188.) Faced with this consistent testimony between two adverse witnesses, the ALJ nonetheless finds that J. Leonard "reasonably would have inferred" that someone told Richardson about his comments at the meeting that Richardson was the main reason the Union was at the facility. (ALJD, p. 9, fn. 10.) There is no reason to make this incorrect inference in the face of consistent testimony. The ALJ's inference is likewise contradicted by the fact that Hammerbacher never told Richardson about Leonard's comments that he was the reason that the Union was at the facility. (Tr. p. 187.)

Second, in a similarly unsupported fashion, the ALJ finds that Richardson said "he hired Leonard and could fire Leonard," despite the fact that Leonard does not allege so. (ALJD, p. 9). J. Leonard instead testified only to his specious inference that Richardson said "remember that I

hired you," and that this implied he could fire him. (ALJD, p. 9.) Richardson testified that he told Leonard he had hired him to reiterate that they were on the same team and that he thinks a lot of him as an employee. (Tr. p. 188.) To the extent that the ALJ's relies on Hopper's affidavit testimony that Leonard has told him that Richardson said he hired Leonard and could fire Leonard, this is also wrong. (ALJD, p. 9) Hopper's affidavit actually said that Leonard told him Richardson has said "something to the effect" that he had hired him and could fire him. (Tr. p. 215.) Leonard's self-serving statements to Hopper do not indicate that Richardson unequivocally told Leonard he could fire him as the ALJ finds.

Third, the ALJ incorrectly relied on the timing of the incident being "about an hour or less" before the representation election began to demonstrate that Richardson's alleged threat would have some immediate impact on J. Leonard's right to free exercise of his rights. (ALJD, p. 9.) Contrary to this finding, Richardson testified that he returned from lunch at around 12:30 or 12:45 on September 14, as he always did and that this is when he spoke to J. Leonard. (Tr. 183.) This would have been two and half (2 ½) hours before voting. J. Leonard's testimony regarding the timing was uncertain at best and no effort was made to rebut Richardson's recall of the timeline. (Tr. pp. 43.) In addition to the fact that Richardson may not have talked to J. Leonard immediately before he voted in an effort to maximize the impact of any alleged threat, J. Leonard's timeline is also inconsistent with this testimony regarding how many conversations he had with other employees following his conversation with Richardson, which was also a basis for the ALJ's finding. (ALJD, p. 9.)

Fourth, the ALJ incorrectly finds that several employees were aware of the conversation between voting periods and implied that this fact increased the impact of Richardson's alleged comments. J. Leonard's testimony that he went to his supervisor Ken Hopper two (2) minutes

after his conversation with Richardson ended simply does not jibe with his testimony or the ALJ's finding, that he talked to several employees between the time he talked to Richardson and the time that he talked to Hopper. (ALJD, p. 9; Tr. pp. 51-52.) In addition, J. Leonard testified that he only spoke to two employees before he voted but does not remember exactly what was said. (Tr. pp. 53-54.) Most importantly, J. Leonard testified that he did not speak to any third shift employees about his conversation before they had an opportunity to vote.[5] (Tr. p. 69.) Hopper testified that he did not hear anything about the incident from other employees until after 4:00 on September 14 – as he was leaving for the day, at which point the polls were closed. (Tr. 218.) No evidence was offered to allege any knowledge of the alleged threat by the third-shift voters. Accordingly, the ALJ could not reasonably conclude that any voters other than J. Leonard were aware of the conversation between him and Richardson.

2. The ALJ erred in crediting Leonard over Valmet's witnesses.

The ALJ credited Leonard's testimony over that of Valmet's witnesses on the basis that both Hammerbacher and Hopper gave inconsistent testimony on other issues. (ALJD, p. 10.) Again, the Board may ignore credibility determinations made by a judge where they are not based primarily upon a witness's demeanor or where they are inconsistent with the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *J.N. Ceazan Co.*, 246 NLRB at 638 fn. 6; *Humes Electric, Inc*., 263 NLRB at 1238.

Here, the ALJ's credibility determination is not supported by the record. To discredit Richardson, the ALJ cites to alleged testimony that he met with Hammerbacher the morning before he spoke with J. Leonard, at which time Hammerbacher was not in town because he had left for

[5] The employees voted in two (2) sessions: first and second shift from 3:00 p.m. to 4:00 p.m. on September 14 and third shift at 6:00 a.m. on September 15.

Michigan to see his sick mother. (ALJD p. 10.) This is simply untrue. Although Hammerbacher was in Michigan on the day of the election, Richardson never testified that he met with Hammerbacher "that morning." He testified that they had morning meetings and that they had discussed the quality issue raised by Leonard during one of those meetings. (Tr. pp. 183-184.) There is no conflict between Hammerbacher's email indicating that the conversation took place on September 5 and Richardson's testimony that he talked to J. Leonard about it on the day of the election.

Moreover, the ALJ ignores the fact that Kohl's testimony corroborated that of Hopper and Richardson. According to J. Leonard, he told Kohl, "if you want to fire me – go ahead." (Tr. 47.) J. Leonard never explained why he would make such a statement to Kohl. Kohl testified that J. Leonard never said any such thing. (Tr. 228-229.) Hopper corroborated Kohl's testimony on this point. (Tr. 208.) Both Kohl and Hopper agreed that J. Leonard never said anything about Richardson's threatening to "fire" him. (Tr. 229.) Kohl testified that it was her impression J. Leonard appeared to be "upset" about the fact that someone had told Richardson about J. Leonard's complaint regarding the questionable roll repair, nothing else. (Tr. 229-230.) She said he did not appear "angry." (Tr. 229.) In fact, Kohl recalled that when she asked J. Leonard if he felt threatened by Richardson's conversation, he only replied "I don't want to get Larry to lose his job." (Tr. 230.)

For these reasons, the Board should not adopt the ALJ's finding that J. Leonard was more credible than Respondent's witnesses or that Richardson unlawfully threatened J. Leonard.

F. The ALJ erred in recommending that a rerun election be held.

Based on his conclusions regarding allegations, the ALJ recommended a rerun election. (ALJD, p. 15.) Valmet excepts to this finding on the grounds that the alleged conduct could not

have affected the results of the election when considered in the context of the overall campaign and considering the communications with employees in their entirety. The objections and unfair labor practice allegations actually constitute a de minimus portion of the overall message provided to employees. These four (4) allegations consisting of only a few, arguably innocuous statements in the context of nineteen (19) total meetings and over twenty (20) written communications to the employees over a four (4) week period do not support overturning the results of the election. Even with affirmative attempts to "set-up" management to generate allegations of unlawful statements, the lack of any clear cut violations and the small number of allegations belies the contention that these employees were threatened or coerced in violation of the Act.

Obviously, if the judge's erroneous findings are rejected, no rerun is appropriate. Even assuming his findings are accepted in whole or in part, however, a rerun is not warranted. Not all unfair labor practice conduct will warrant setting aside an election. If the conduct is unlawful and objectionable, the election will not be set aside if the conduct "is so de minimis that it is virtually impossible to conclude that [the violations] could have affected the results of the election." *Airstream, Inc.*, 304 NLRB 151, 152 (1991) (internal quotations omitted).

Here, at most, there were five (5) instances of unlawful conduct during the critical period. Hammerbacher's alleged unlawful comments took place at least ten (10) day prior to the election, and one employee actually admitted not only that he had time to, but actually did seek clarification of the issue of step progression wage increases from the Union. (Tr. p. 81.) Sheaffer's alleged comments regarding the issue of wage increases only occurred in one (1) meeting out of six (6) that Sheaffer led. Wallace's alleged comments were only made to two (2) employees, neither of whom communicated the comments to any other employees. Similarly Richardson's alleged

threats were made to a single employee whose vote was not impacted and admittedly did not communicate the conversation to any other employees before they voted.

Given that none of the unfair labor practices were of a serious nature (as compared to threats of plant closures, granting benefits, etc.), there is no doubt that "it is virtually impossible to conclude that [the alleged violations] could have affected the results of the election." *Airstream, Inc.*, 304 NLRB at 152. Consequently, the Board should reject the judge's recommendation that a rerun election be held, assuming it adopts his recommendations on one or more of the violations.

VI. CONCLUSION

This election took place over seven (7) months ago. The majority of the employees in the proposed unit secretly voted that they did not want to be represented by this Union. No adverse action was taken against a single employee for exercising his Section 7 rights during the campaign. The record makes clear that employees were thoroughly educated about unionization by both sides in an atmosphere free from intimidation or coercion that unfortunately plagues many other workplaces.

At Valmet, supervisors and managers were respectful and considerate of all employees' views on the subject. For the judge to conclude that any of the forty-three (43) employees who voted for the Company did so because of threats or coercion from any representative or non-representative of Valmet is erroneous.

As the judge in *Arrow-Hart* so eloquently stated, "The play is over; the Union lost . . . ." *Arrow-Hart*, 203 NLRB at 406. To order the parties to put on another performance under these circumstances would undermine the fundamental purpose of the Act, which is to permit employees to make a free choice as to whether or not they want to be represented by a union. The Board is

implored to respect the will of the majority of workers at this plant, understanding that doing so is consistent with the letter and spirit of the law

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Respectfully submitted,

By: s/Joshua H. Viau

FISHER & PHILLIPS LLP
JOSHUA H. VIAU
DOUGLAS R. SULLENBERGER
1075 Peachtree Street, NE
Suite 3500
Atlanta, GA 30309
Tel: 404-231-1400
Fax: 404-240-4249
jviau@fisherphillips.com

Attorneys for Respondent

Dated this 22nd day of May 2018

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VALMET, INC. and UNITED STEEL, PAPER AND FORESTRY RUBBER, MANUFACTURING, ENERGY, ALLIED AND INDUSTRIAL SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO	CASES: 15-CA-206655 15-RC-204708

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2018, I e-filed the foregoing **RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE** with **the** office of the NLRB's Executive Secretary using the Board's e-filing system and that it was served on the following individuals via email and/or Federal Express:

Andrew Miragliotta
Counsel for the General Counsel
National Labor Relations Board, Region 15
600 South Maestri Place, 7th Floor
New Orleans, LA 70130-3413
andrew.miragliotta@nlrb.gov

Brad Manzolillo
USW Organizing Counsel
60 Boulevard of the Allies
Five Gateway Center Room 913
Pittsburgh, PA 15222
bmanzolillo@usw.org

s/Joshua H. Viau
Joshua H. Viau